STATE OF NEW MEXICO
BEFORE THE ENVIRONMENTAL IMPROVEMENT BOARD

IN THE MATTER OF PROPOSED REVISIONS TO: **No. EIB 16-03 (R)**
***New Mexico's State Implementation* Plan**

Air Quality Bureau,
Environmental Protection Division of the
New Mexico Environment Department

DIRECT TESTIMONY OF ROBERT SPILLERS

Witness Qualifications:

Robert Spillers is an Environmental Analyst in the Control Strategies Section of the New Mexico Environment Department (NMED or Department) Air Quality Bureau (Bureau). Mr. Spillers' resume is attached as NMED Exhibit 4.

I. INTRODUCTION

Mr. Spillers submits this direct testimony on behalf the Department and in support of the proposed revisions to the State Implementation Plan (SIP). These revisions entail removing certain sections of 20.2.7 NMAC-Excess Emissions (Part 7) from the SIP and leaving the removed sections in the rule as state-only provisions. A "markup" version of the proposed revisions is attached as NMED Exhibit 5.

II. REGULATORY BACKGROUND

The Clean Air Act (CAA) requires New Mexico to adopt and submit a plan for the implementation, maintenance, and enforcement of primary and secondary national ambient air quality standards (NAAQS) to the EPA pursuant to the CAA Section 110(a). Part 7 was

originally adopted as Air Quality Control Regulation 801 in 1970, and was subsequently approved by the U.S. Environmental Protection Agency (EPA) as part of the original SIP for New Mexico. 38 Fed. Reg. 12702, 12704 (May 14, 1973). Reporting requirements were added in 1981.

Since the original adoption of Part 7, EPA has issued several policy statements regarding the type of enforcement discretion that states could exercise for excess emissions without violating the CAA. In 2004, the EPA notified the Department that the 1981 amended rule was inconsistent with the EPA's interpretation of the CAA. In 2007 the Department began a concerted effort with stakeholders and the EPA to create a rule that would conform to EPA's interpretation of the CAA, ultimately proposing repeal and replacement of Part 7. There were several reasons for the repeal and replacement of Part 7 in 2008, including:

- The 1981 rule did not conform to EPA's 1999 guidance;
- The 1981 rule was vague and created uncertainty for the business community; and
- The rule was inadequate to stem the flow of excess emission reports.

The 2008 rule adopted the EPA's criteria issued through the 1999 policy nearly verbatim. In a letter dated April 30, 2008, EPA Region VI stated: "With respect to the proposed addition of 20.2.7.14 NMAC . . . we applaud NMED's efforts to ensure that all emissions from a source are properly permitted, including routine emissions occurring during periods of startup, shutdown, and maintenance activities." *See* NMED Exhibit 7. In the Federal Register notice containing EPA's approval of the 2008 rule, 74 FR 46910, included herein as NMED Exhibit 8, EPA stated that, "We are approving the October 7, 2008 SIP submittal because the revisions to 20.2.7 NMAC are consistent with the [CAA]. This action is in accordance with section 110 of the [CAA]." NMED Exhibit 8, 74 Fed. Reg. 46910, 46910 (Sept. 14, 2009). The EPA recognized

that, "While all excess emissions are violations, …imposition of a penalty for sudden and unavoidable malfunctions, startups, or shutdowns caused by circumstances entirely beyond the control of the owner or operator may not be appropriate. NMED Exhibit 8, 74 Fed. Reg. 74910, 46912.

On June 30, 2011, the Sierra Club filed a petition with EPA concerning treatment of excess emissions during periods of startup, shutdown, and malfunction (SSM) of industrial processes or emission control equipment by air agency rules in EPA-approved SIPs. (Sierra Club Petition) NMED Exhibit 9. In response to the Sierra Club Petition, the EPA issued a proposed rule, State Implementation Plans: Response to Petition for Rulemaking; Findings of Substantial Inadequacy; and SIP Calls To Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction; Proposed Rule, 78 Fed. Reg. 12459 (Feb. 22, 2015). *See* NMED Exhibit 10.

In response to the EPA's proposed rule, the Department submitted comments strongly disagreeing with the EPA findings of substantial inadequacy with Part 7. *See* NMED Exhibit 11. The Department also argued that EPA Headquarters did not consult with EPA Region VI prior to issuing its findings. NMED Exhibit 11, pg. 1. The Department's letter reiterated that during the rule development, the Department worked closely with EPA Region VI, and as a result, the 2008 rule mirrored the 1999 guidance. *Id*. Along with the comment letter, the Department submitted an interpretive letter that detailed how the Department's rule conformed to the 1999 policy and the CAA. *See* NMED Exhibit 12. On June 12, 2015, the EPA issued its final action on the Sierra Club's Petition for rulemaking. *See* NMED Exhibit 14, 80 Fed. Reg. 33840 (June 12, 2015).

III. FINAL RULE OVERVIEW

In the final action, EPA clarified, restated, and revised its guidance concerning its interpretation of the CAA requirements with respect to treatment in SIPs of excess emissions that occur during periods of SSM. The EPA specifically evaluated existing SIP provisions in a number of states, including New Mexico, for consistency with the EPA's interpretation of the CAA and in light of recent court decisions addressing this issue. *See* NMED Exhibit 14. The EPA issued a finding that certain New Mexico SIP provisions, found in 20.2.7 NMAC Excess Emissions, are substantially inadequate to meet CAA requirements and, thus, issued a "SIP call" for New Mexico and 35 other states. Specifically, EPA found sections 20.2.7.111, .112, and .113 substantially inadequate. NMED Exhibit 14, 80 Fed. Reg. 33840, 33967- 68. SIP revisions are due no later than eighteen (18) months from the issuance of a SIP call (Nov. 22, 2016). NMED Exhibit 14, 80 Fed. Reg. 33840, 33847. Included in the final action was EPA's updated SSM Policy as it applies to SIP provisions.

EPA's final rule also addressed a 2014 federal court decision finding that the CAA precludes EPA's authority to create affirmative defense provisions applicable to private civil suits, *Natural Resources Defense Council v. EPA*, 749 F.3d 1055 (D.C. Cir. 2014), (NRDC) attached herein as NMED Exhibit 13. The federal court found that CAA sections 113 and 304 preclude EPA's authority to create affirmative defense provisions in EPA's National Emission Standards for Hazardous Air Pollutants (NESHAP) for sources that manufacture Portland cement because such provisions purport to alter the jurisdiction of federal courts to assess liability and impose penalties for violations of those limits in private civil enforcement cases. NMED Exhibit 13, pp. 15-16; *NRDC*, 749 F.3d at 1063. The EPA believes that the reasoning of the court in *NRDC* indicates that the states also have no authority in SIP provisions to alter the jurisdiction of

federal courts to assess penalties for violations of CAA requirements through affirmative defense provisions. *See* NMED Exhibit 14, 80 Fed. Reg. 33840, 33851. If states lack authority under the CAA to alter the jurisdiction of the federal courts through affirmative defense provisions in SIPs, then the EPA lacks authority to approve any such provision in a SIP. *Id*.

IV. AFFIRMATIVE DEFENSE

The affirmative defense process allows an emitter to claim a defense from civil penalties for an excess emission, i.e., a violation of its emissions limits allowed under the facility permit or under an applicable regulation. For example, an emitter might claim that the excess emissions were due to unavoidable malfunction of equipment at the facility. The Bureau reviews the information submitted by the emitter to determine if the excess emissions meet the criteria for an affirmative defense specified in Part 7. If it does, the Bureau approves the affirmative defense and would not assess a penalty for the excess emission, even though it is still considered a violation of the facility permit. Under the current regulatory process, there is no automatic affirmative defense approval and not all affirmative defenses claims are approved. Only those which meet all the criteria specified in 20.2.7 NMAC for affirmative defense may be approved, and the Bureau retains the ability to enforce compliance pursuant to 20.2.7.116 NMAC.

V. DETERMINATION FOR 20.2.7 NMAC

EPA granted the Sierra Club's Petition regarding the three provisions in the New Mexico SIP that provide affirmative defenses for excess emissions that occur during malfunctions (20.2.7.111 NMAC), startup and shutdown (20.2.7.112 NMAC), and emergencies (20.2.7.113 NMAC). NMED Exhibit 14, 80 Fed. Reg. 33840, 33967 – 68. The Sierra Club objected to the

inclusion of these provisions in the SIP based on its view that affirmative defense provisions are always inconsistent with CAA requirements. NMED Exhibit 9, pp 54-55. The Sierra Club also argued that each of these affirmative defenses is generally available to all sources, which is in contravention of the EPA's recommendation in the SSM Policy that affirmative defenses should not be available to "a single source or groups of sources that has the potential to cause an exceedance of the NAAQS." *Id*. Finally, the Sierra Club argued that the affirmative defense provision applicable to emergency events is impermissible because it was modeled after the EPA's Title V regulations, which are not meant to apply to SIP provisions. *Id*. at pg. 55. The EPA found that all three of these provisions are inconsistent with CAA sections 110(a)(2)(A), 110(a)(2)(C) and 302(k), and with respect to CAA sections 113 and 304. NMED Exhibit 14, 80 Fed. Reg. 33840, 33967 – 68.

The EPA also found that the affirmative defenses for all three sections limited the jurisdiction of the federal court in an enforcement action and limited the authority of the court to impose monetary penalties as contemplated in CAA sections 113 and 304. NMED Exhibit 14, 80 Fed. Reg. 33840, 33846. The EPA believes that each of these provisions interferes with the intended enforcement structure of the CAA through which parties may seek to bring enforcement actions for violations of SIP emission limits and courts may exercise their jurisdiction to determine what, if any, relief is appropriate. *Id*. Particular to each identified section in Part 7, the EPA stated the following:

20.2.7.111 NMAC: The EPA reasoned that this provision is inconsistent with the CAA because it neither limits the defense to only those sources that do not have the potential to cause exceedances of the NAAQS or PSD increments nor requires sources to make an "after the fact"

showing that no such exceedances actually occurred as an element of the affirmative defense. This section also limits the jurisdiction of the federal court in an enforcement action and limited the authority of the court to impose monetary penalties. NMED Exhibit 10, 78 Fed. Reg. 12460, 12523 (February 22, 2013).

To clarify the Department's intent of Section 111 of Part 7, the Department stated in its interpretive letter to EPA that:

> To the extent section 111 may be interpreted as ambiguous, the AQB hereby clarifies that it will not grant an affirmative defense to a source or group of sources whose excess emissions had the potential to cause an exceedance of the NAAQS or PSD increments. (Nor has the AQB done so in the past.) To verify that the NAAQS and PSD increments were not threatened by an excess emission event, the AQB will, as necessary, (1) use its authority to request additional information, pursuant to 20.2.7.111.B NMAC; (2) base its determination on any relevant information, including but *not limited to* that submitted by the source or obtained through inspection, pursuant to 20.2.7.115 NMAC; and (3) treat an exceedance of a NAAQS or PSD increment as an "appropriate reason" to take an enforcement action pursuant to 20.2.7.116 NMAC, notwithstanding any prior determination regarding an assertion of affirmative defense.
> NMED Exhibit 12, pg. 2.

It has never been, nor will it ever be, the intent of the Department to limit private civil suits or the authority of federal courts to impose penalties with respect to affirmative defenses as stated clearly in 20.2.7.115 NMAC.

20.2.7.112 NMAC: The EPA interpreted this section to allow an affirmative defense for excess emissions that occur during planned events such as startup and shutdown which is contrary to the EPA's current interpretation of the CAA to allow such affirmative defenses only for events beyond the control of the source, i.e., during malfunctions. NMED Exhibit 10, 78 Fed. Reg. 12460, 12523. This section also limits the jurisdiction of the federal court in an enforcement action and limited the authority of the court to impose monetary penalties. NMED Exhibit 14, 80 Fed. Reg. 33840, 33852.

The Department's interpretive letter states with respect to section 112 of Part 7:

> The State of New Mexico's SIP submittal for 20.2.7 NMAC submitted to EPA on October 7, 2008, clearly states that the intent and AQB's interpretation of 20.2.7.112 NMAC is that all routine and predictable emissions resulting from startup, shutdown, and scheduled maintenance must be addressed in the permit process, thus limiting what may be claimed as an excess emission during startups and shutdowns to those emissions that are not predictable or routine.
>
> The permitting requirements for emissions related to predictable or routine startups and shutdowns are outlined under 20.2.7.15 NMAC. Both Sections 15 and 112 were developed based on written and verbal correspondence from EPA Region VI, who advised the AQB that all predictable or routine startup, shutdown and scheduled maintenance emissions should be subject to permit limitations. Sections 15 and 112 provide the AQB with the necessary provisions to ensure that only those excess emissions that occur during unpredictable or non-routine startup and shutdown events are afforded the opportunity to claim an affirmative defense. To the extent that Section 112 is ambiguous, the AQB hereby clarifies that it will not grant an affirmative defense to a source for a planned startup or shutdown, nor has it done so in the past.

NMED Exhibit 12, pp. 2-3.

20.2.7.113 NMAC: The EPA stated that this provision is an impermissible affirmative defense because it does not explicitly limit the defense to monetary penalties; it establishes criteria that are inconsistent with those in the EPA's SSM Policy; and it can be read to create different or additional defenses from those that are provided in underlying federal technology-based emission limitations. NMED Exhibit 10, 78 Fed. Reg. 12460, 12523. This section also limits the jurisdiction of the federal court in an enforcement action and limited the authority of the court to impose monetary penalties. NMED Exhibit 14, 80 Fed. Reg. 33840, 33852.

In addressing section 113 of Part 7, the Department's interpretive letter states that:

> AQB interprets 20.2.7.113 NMAC as follows: (1) The affirmative defense requirements in Section 113 do not explicitly limit the defense to civil penalties; however, it was not the intent nor has it been the practice of the AQB to extend this defense to injunctive relief. (2) The affirmative defense requirements in Section 113 are not as thorough as those for startup, shutdown and malfunction; however, Subsection C under Section 113 establishes that in any enforcement proceeding, the owner or operator seeking to establish the occurrence of an emergency has the burden of proof. In addition, Subsection D under Section 113 establishes that the AQB has the authority to require additional information if deemed necessary. (3) The New Mexico Environmental Improvement Board is generally prohibited by the New Mexico Air Quality Control Act from adopting regulations that are more or less stringent than comparable federal regulations, thus prohibiting additional defenses beyond those already provided in federal technology based standards. To the extent that Section 113 is ambiguous, the AQB hereby clarifies that it will not grant an affirmative defense to a source for an

> emergency claim for injunctive relief, nor will the AQB consider any additional defenses beyond those already provided in federal technology based standards.
> NMED Exhibit 12, pg. 3.

VI. REGULATORY ALTERNATIVES

The EPA allows the state broad discretion concerning how to revise its SIP. NMED Exhibit 14, 80 Fed. Reg. 33840, 33847. There are several approaches that would be consistent with the CAA. *Id*. at 33844, 47. The EPA suggested some alternatives to addressing the deficiencies including approaches that revolve around repealing and/or revising provisions. Under one approach, the Department could repeal Part 7 in its entirety (both from the SIP and from state-only requirements), thereby eliminating the ability of affected sources to assert an affirmative defense in all types of enforcement actions. Under another approach, the Department could remove Sections 111, 112, and 113 in their entirety from the SIP but retain them as state-only requirements, thereby eliminating the ability of affected sources to assert an affirmative defense in federal proceedings initiated by either the EPA or a citizen. Under a third approach, the Department could replace all references to affirmative defenses in Sections 111,112, and 113 with provisions that provide an enforcement discretion approach. Under this approach, rather than providing an affirmative defense, the same criteria contained in the current sections would be applied on a case-by-case basis to govern the exercise of enforcement discretion by Department staff when considering whether to assess penalties for excess emission during SSM. Finally, under a fourth approach the Department could develop alternative emission limitations — either numerical, work practice standards, or a combination thereof — that apply during SSM events.

Ultimately, in order to be approvable, special provisions regarding the treatment of excess emissions during SSM must not preclude federal courts from determining whether

violations occurred or imposing appropriate penalties. After reviewing the EPA's directive in the SIP Call, the effect on the enforcement program, and public comments, the Department chose an approach that removes the affected sections of Part 7 from the SIP as well as other sections or language that mention affirmative defense or reference any sections that have to do with affirmative defense provisions. *See* NMED Exhibit 5.

VII. REVISIONS TO 20.2.7 NMAC - *EXCESS EMISSIONS*

NMED proposes that the follow sections of 20.2.7 NMAC be removed from the SIP in response to the corrective action as outlined in the SIP Call:

- 111-Affirmative Defense for an Excess Emission During Malfunction
- 112-Affirmative Defense for an excess emission During Startup or Shutdown
- 113-Affirmative defense for an Emergency

In addition to the affected sections above, the Department proposes to remove any language from Part 7 that either mentions or refers to any sections for affirmative defense in Part 7. The following are also proposed to be removed/repealed from the SIP:

- Section 106 subsection B
- Section 110 Subsection B Paragraph 15
- Section 115

The Department maintains that the underlying reasoning behind the sections and their compliance with the 1999 guidance is sound. Enforcement of these provisions establishes a practical procedure for emitters to use when addressing excess emission violations. The only change since these sections were enacted has been EPA's interpretation of the CAA as seen in its Final Action of June 2015. Removing these

sections from the SIP will allow the state to maintain an effective enforcement program for permitted facilities without impeding civil or federal actions for violations associated with SSMs. The Department further proposes to denote which portions of Part 7 have been removed from the SIP through annotations following each section.

The Department submitted the draft Part 7 revisions to EPA for review and comments. On May 25, 2016, the EPA responded that, "As proposed,…an approach of retaining affirmative defense-related provisions of the Excess Emissions Rule as a matter of state law, outside of the SIP…, would be consistent with CAA requirements, and consistent with the EPA's guidance in the [SSM] Policy." NMED Exhibit 15, pg. 1.

VIII. WHAT IF THE EIB DOES NOT ADOPT THE PROPOSED REVISIONS?

Should the EIB choose not to adopt the proposed revisions discussed above, New Mexico runs the risk of failing to maintain consistency with federal requirements and creating regulatory uncertainty for affected sources. If the state fails to submit its corrective SIP revisions by the November 22, 2016, deadline, then the EPA could, after issuing a Finding of Failure, impose a federal implementation plan ("FIP"). NMED Exhibit 14, 80 Fed. Reg. 33840, 33848. In addition, if the State fails to make the required SIP revision, or the EPA disapproves the state's plan, either event can trigger a mandatory 18-month or 24-month sanctions clock pursuant to Section 179 of the CAA. The two sanctions that apply under CAA Section 179(b) are restrictions on highway funding or 2-to-1 emissions offset for all new and modified major sources subject to the nonattainment new source review ("NSR") program.

IX. PUBLIC NOTICE AND OUTREACH

The Department developed the proposed SIP revisions through a stakeholder process. Prior to the draft SIP revisions to Part 7, the Department met with industry and held three public information meetings in December of 2015 to allow the general public and industry the opportunity to provide input on the SIP revisions.

Summary of Initial Public Outreach Comments

- Some stakeholders did not understand the proposal, and others opined that the Department should fight the SIP Call.
- Interested parties asked which direction the Department intended to follow and if there had been any discussions on this point.
- Others asked what the Department would need to do to gain EPA approval for a revised rule.
- If the Department proposed any changes to the rule, would the Department work with industry on guidance for any revisions?
- Some stated that the Department would be doing a disservice to the regulated community if it proposed to remove the affirmative defense provisions.
- Finally, some comments suggested removing the affirmative defense provisions from the SIP and keeping them as state-only provisions.

Once the Department had the draft revisions to Part 7, the Department held three more meetings in April of 2016 to allow the general public and industry the opportunity to provide comments on the draft SIP revisions.

Summary of Public Meeting Comments

Comments received during the public comment meetings on the draft SIP revisions were positive, with those in attendance in favor of the Department's proposal to remove the affected sections from the SIP while maintaining them as state-only provisions. While the Department does not propose a rule change, SIP revisions must still meet the public notice and hearing requirements of the CAA. Therefore, the Department requested this hearing, and a public notice of the proposed SIP revisions was published in the Albuquerque Journal, in both English and Spanish, on July 11, 2016. NMED Exhibit 16.

X. CLOSING

It was never, nor will it ever be, the intent of Part 7 to preclude an enforcement action by the federal government or a citizen suit pursuant to the CAA, as explicitly stated in 20.2.7.115 NMAC. The excess emissions rule essentially affects all regulated sources and the public within the state. Out of the options available to the state to address the SIP Call, the Department decided that removing the affected sections from Part 7 was the best fit for the state. Removing the sections above from the SIP will allow the state to maintain enforcement over the permitted facilities without impeding civil or federal actions for violations associated with SSMs. There will not be any regulatory change associated with the SIP revisions. The proposed revisions to Part 7 will not have adverse effects on small businesses since, practically speaking, nothing is changing; the proposed revisions will not increase the regulatory burden on regulated facilities; they will not cause any increase in emissions from regulated facilities; and technical practicability and economic reasonableness will not be at issue since the regulation itself has not changed. The Department respectfully requests that the Board approves the proposed SIP revisions to Part7. Thank you.